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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925

IN EQUITY NO. 202.

C. C. CHILDERS, State Auditor of the State of Oklahoma - - - - - - - Appellant

against

JOHN BEAVER and BENJAMIN QUAPAW, - - - - - - - - - - - - - Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from a final decree in favor of the plaintiffs (Appellees here) enjoining the State Auditor of the State of Oklahoma from collecting a State Inheritance Tax, pursuant to the opinion of the District Court of the United States for the Eastern District of Oklahoma, rendered on the 19th day of July, 1924, and reported in Volume 300 of the Federal Reporter, beginning at page 113 thereof, in the case of *Beaver* v. *Short*.

The question here presented is whether the restricted estate of a deceased Quapaw allottee, who died in the year 1920, inherited by heirs who are full-blood Quapaw Indians of the restricted class, is subject to the Inheritance Tax Law of the State of Oklahoma of March 15, 1915, comprising Chapter 162 of the Session Laws of 1915, as amended by Act of March 25, 1919, Chapter 296 of the Session Laws of Oklahoma for the year 1919.

The statement of ultimate facts, as set forth in the Amended Bill of Complaint, is accepted by both parties as correct, pursuant to a stipulation, duly executed, wherein it was agreed that the issues should be confined

> "to the sole question of whether transfers by inheritance of Indian property of the kind and under the circumstances mentioned in the bill of complaint are subject to the Inheritance Tax Laws of the State of Oklahoma, for the guidance, of both State and Federal Officers concerned in the administration of such matters".

The facts are as follows:

Se-Sah Quapaw, a full-blood Quapaw allottee, died intestate in the year 1920, leaving as her sole heirs her brother, John Beaver, and her husband, Benjamin Quapaw, the appellees herein. Her estate, as set forth in the amended bill of complaint, consisted of her own allotment, and a half interest in the allotment of a deceased child, who died in the year 1900. Both of the allotments were made inalienable for 25 years from the date of patent, pursuant to the Act of March 2, 1895, (28 Stat. 876, 907), and in each case the restrictions were continued for another period of 25 years by the Act of Congress approved March 3, 1921, (41 Stat. 1225, 1248.)

Attention is here invited to the claim of counsel for the Appellant, as set forth in their brief, that the estate of See-Sah Quapaw included a cash sum of $11,879.44 of unrestricted moneys in addition to the lands before mentioned. This statement was apparently made through inadvertence, as no reference is made to such a sum in the Stipulated Statement of facts. However, counsel for Appellees admits the existence of approximately that sum, at the death of See-Sah Quapaw, which sum was held in trust by the Superintendent of the Quapaw Agency, but is in a position to state positively that the amount so held consisted of royalties from these restricted allotments which had accrued to her credit during her life-time, and that the same was disbursed for the benefit of her heirs prior to any claim being asserted for the payment of an Inheritance Tax thereon; and, furthermore, that all sums held to the credit of the heirs at this time accumulated since her death from the same sources.

It is also necessary, to afford a correct statement of the facts, to advise the Court that no administrator has ever been appointed for the estate of See-Sah Quapaw. Three different superintendents have been in charge of the Quapaw Agency from the time of her death to the present time and none of them was ever appointed to that position. Each, in his turn, has held her lands and money in custody, as in the case of other restricted Quapaw Indians, but only in his capacity as an Officer of the United States.

With these fundamental matters before the Court, attention is invited to the points in issue.

SUMMARY OF POINTS

I.

The State Inheritance Tax Laws are repugnant to and inconsistent with the treaty stipulations and federal statutes pursuant to which the lands in question were allotted, in that such State laws infringe upon and interfere with the trusteeship of the United States and conflict with the intent of Congress that the restrictions should run, unimpaired, with the land to the end of the restricted period. (Page 6 hereof).

II.

The State Inheritance Tax laws are repugnant to and inconsistent with the Constitution of the State of Oklahoma and the Enabling Act of Congress admitting the State into the Union. (Page 19 hereof.)

III.

If any kind or class of property is itself exempt from taxation in pursuance of a governmental policy, as a Federal instrumentality, it follows, as a corollary that it cannot consistently be subjected to any indirect form of taxation such as an income, gross-production or privilege tax. (Page 25 hereof.)

IV.

Where Indian lands are unequivocally declared inalienable and are held under governmental control and supervision, the restriction is a limitation upon involuntary, as well as voluntary, alienation and renders such lands exempt from all forms of taxation. (Page 26 hereof)

V.

Exemptions in express words are not necessary to render Indian lands non-taxable if it is clearly intended

the lands are to be inalienable. (Page 28 hereof.)

VI.

The decisions cited by counsel for Appellant for the purpose of showing that State Inheritance Taxes have been upheld, notwithstanding the Government has some form of interest in the inherited property, have no controlling force in determining the validity of an inheritance tax on restricted Indian lands. (Page 29 hereof.)

VII

The decisions cited by counsel for Appellant to show that the United States has no jurisdiction of Indian lands located in new States, after the admission of such States, have no controlling force in the determination of the question before the Court. This, for the reason that there is nothing in those decisions in derogation of the power of Congress to act in matters committed to its jurisdiction by the National Constitution even though the subject matter may be located within the limits of a state. (Page 31 hereof.)

VIII.

The constitutional theory advanced by counsel for Appellant is another form of the old contention, now obsolete, that the grant of citizenship to Indians was inconsistent with restrictive Indian legislation, and it is so far-reaching and all-inclusive that one of two conclusions must follow: (1) it must be accepted as properly challenging the validity and correctness of the actions and decisions of all Departments of the National Government respecting important Indian matters in Oklahoma, beginning with the Enabling Act, or, (2) it must be rejected as fundamentally unsound. (Page 37 hereof.)

ARGUMENT

I.

The State Inheritance Tax Laws are repugnant to and inconsistent with the Treaty Stipulations and Federal Statutes pursuant to which the lands in question were allotted, in that such state laws infringe upon and interfere with the Trusteeship of the United States and conflict with the intent of Congress that the restrictions should run, unimpaired, with the land to the end of the restricted period.

While this controversy arises primarily from the attempt of the State Officers to apply the State Inheritance Tax Laws to this estate, the real question is not so much one of taxation—although that is necessarily involved—as it is to determine whether the State in making such an attempt, is encroaching upon the domain of Federal Jurisdiction and is undertaking to do that which amounts to an interference or obstruction to the administration of the laws of the United States. It is the desire of counsel for appellees to project this question prominently into the foreground, irrespective of whether the State Inheritance Tax is a tax on property, or is merely a transfer charge or, in other words, a price imposed for the privilege of inheriting, it being contended on behalf of appellees that the logical result is the same in either case, *Brown* v. *Maryland,* 12 Wheat. 419, 444, and that, regardless of the name, it would burden a Federal instrumentality. *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292, 298; *McCulloch* v. *Maryland,* 4 Wheat, 316, 425; *Farmer's Bank* v. *Minn,* 232 U. S. 516.

It is further submitted on behalf of appellees that the legislation of Congress and the Laws of Oklahoma, read in the light of the pertinent decisions of the Federal and State courts, to which reference will now

be made, disclose unmistakably the existence of two separate and distinct sovereignties which function separately and apart in their respective fields, and that, in Indian affairs, the termination of the jurisdiction of the one marks the point where the authority of the other begins.

By Article 1 of the Treaty of 1824, (7 Stats., 232), the Quapaws ceded their tribal domain, which was located in the Territory of Arkansas, to the United States, for and in consideration of certain money payments and other benefits, including domicile and membership in the Caddo Tribe residing on or near the Red River.

They found their new location unfit for residence on account of climatic conditions and a new Treaty was negotiated with them, by the United States, in the year 1833, (7 Stat. 424), by Article 1 of which they relinquished and conveyed their lands in the Caddo country to the United States. The consideration for such conveyance, as set forth in Article II of said Treaty, was the promise of the Government to convey to them 150 Sections of land in the district now embraced in Ottawa County, Oklahoma, expressed in the following terms:

> "The United States agree to convey the same patent, to them and their descendents as long as they shall exist as a nation or continue to reside thereon, and they also agree to protect them in their new residence, against all interruption or disturbance from any other tribe or nation of Indians or from any other person or persons whatever."

It may be remarked, in passing, that this guarantee, which should protect the Quapaws from the forcible taking of their lands by the State of Oklahoma, whether

under the guise of taxation or otherwise, and from the assertion of any right in or to said lands, has never been rescinded or withdrawn, by any law or treaty, and that this treaty obligation stands today with all of its original force and effect, putting at rest effectively the claim of the State that the descendents (heirs) of the Quapaws seceeed to the ancestral estates of their forefathers save and only by the consent and grace of the State, subject to a price or penalty for such succession termed and designated as an "Inheritance Tax."

The United States never did convey these lands to the Quapaws in conformity with its agreement, as set forth above, and after living upon such lands for many years, as a community, the Quapaws undertook, under the advice of an adopted member, to divide or allot their domain among their members, pursuant to an Act of the National Council approved March 23, 1893.

Congress, by Act of March 2, 1895, (29 Stat., 876, 907), ratified and confirmed these allotments, subject to necessary changes and corrections, and authorized the Secretary of the Interior to issue patents accordingly, with the following proviso:

> "*Provided*, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents,"

which provision was incorporated in the patents for the lands herein involved, issued in the month of September, 1896.

The patents issued to the Quapaws, aside from the fact that the Quapaw Nation acquired the legal title thereto, are in form and effect similar to the deeds issued

to the Creek allottees, by the Principal Chief of that Nation, subject to restrictions on alienation.

The status of the Creek title is defined in the follownig excerpt from the decision of the United States Supreme Court in the case of *Tiger* v. *Western Investment Company*, (221 U. S., 286, 316):

> "The inherited lands, *though otherwise held in* fee, were inalienable without the consent of the Secretary of the Interior, until August, 1907, by virtue of the Act of Congress." (Italics supplied.)

In the same decision the Supreme Court quoted at length (page 312-313) from the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Beck* v. *Flourney Livestock Company*, (65 Federal 30, 35), relating to a case involving lands that were patented in trust, containing the following sentence:

> "It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the Government."

From the foregoing it is apparent that the Supreme Court looked upon conveyances of Indian lands by deeds made subject to restrictions on alienation as being of substantially the same effect as conveyances made by trust

patents. Accordingly, appellees contend that the decisions of the courts which preserve the jurisdiction of the Government over trust lands are equally applicable to lands conveyed to Indians by ordinary deeds containing restrictions on alienation.

If there were any question on this point as to Quapaw lands the matter has been set at rest by the decision of the Supreme Court of the United States in the case of the *United States* v. *Bowling*, (256 U. S., 484), wherein the Court discusses fully the two classes of conveyances and draws the conclusion that the same rules are applicable to both respecting the jurisdiction of the United States in probate matters.

And, in this connection, it must be borne in mind, that, contrary to the rule in the Five Civilized Tribes, restrictions do not terminate as to Quapaw allotments with the death of the allottee, but continue for the full 25 years the property is to be held in trust under supervision, and that the restrictions run with the land and apply to the heirs as well as to the original allottee.

—*Goodrum* v. *Buffalo*, 104 S. W., 942, 944;

—*Bowling* v. *United States*, 191 Federal 19.

That the Government has preserved its distinct sovereignty respecting Quapaw affairs, and especially in Probate matters, is a fact which does not require extended argument.

—*United States* v. *Bowling*, 256 U .S., 484;

—*Blansett* v. *Cardin*, 256 U. S., 319.

The general principle that the United States retains its supreme jurisdiction over restricted lands is announced

with renewed force in a recent opinion of the Supreme Court of the United States, delivered April 7, 1924, in the case of the *Sperry Oil Company, et al* v. *Pearl Chisholm*, 264 U. S. 488, wherein the Court refers at some length, as a precedent, to the case of *Blansett* v. *Cardin, supra.* In fact, the ruling in the Chisholm case is controlling in this, as appears from the 5th paragraph of the syllabus which reads as follows:

> "5. The provision of the Oklahoma Enabling Act that all laws in force in Oklahoma Territory at the time of the admission of the State should be in force throughout the State, 'except as modified or changed by this Act of by the Constitution of the State', related only to laws affecting the citizens of the State generally, and did not authorize the application of such laws in contravention of acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself."

The same principle, as well as the line of demarcation between the respective fields of Federal and State Sovereignty, is clearly enunciated in a decision of the Supreme Court of Oklahoma rendered January 21, 1921, in the case of *Malone* v. *Walmsley*, (80 Okla., 181, 195 Pac., 495), which is a land-mark in the exposition of the State law both on account of the point herein mentioned and as to the construction of the Enabling Act under which Oklahoma was admitted into the Union, (34 Stat. 267). In this decision the Court said: (Page 486)

> "It is now well settled in this jurisdiction that the county courts, in approving conveyances of full-blood Indian hears, perform the duty of Federal Agents, and are controlled and regulated by the laws of Congress, and in determining the validity of

the acts of the county court in approving conveyances executed by Indian heirs we must look solely to the Acts of Congress."

The Court, in the same decision, also included the following excerpt from the decision of the Supreme Court of Oklahoma in *Collins Inv. Co., et al.* v. *Beard,* (46 Okla. 310, 148 Pac. 846): (Page 485)

> "The statutes referred to above need no analysis, or even a construction for the reason that when the question of the removal of restrictions on allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the Acts of Congress and to those Acts and Laws alone. In other words, if a State law, by its language or through its proper construction or its operation would permit the alienation of a restricted Indian allotment, or render a deed thereto effective, where the land would not be alienable, or the deed thereto effective, under the Acts of Congress dealing with the subject matter, *then the State laws fail.* (italics supplied); and this because the Federal Government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms by which Oklahoma became a State; and this reservation of jurisdiction was assented to in the Constitution which the people adopted."

Without specific reference to all of the Acts in question, plaintiffs request the Court to note that the Department of the Interior is vested with jurisdiction under Federal law with complete jurisdiction, *in probate matters,* in the Quapaw Agency, as follows:

1. To determine the heirs of deceased allottees.
2. To approve the wills of Quapaw allottees.
3. To partition their inherited lands.

4. To supervise the sale of such lands and to hold the proceeds in trust or to disburse the same for the benefit of the heirs.

5. To exact a fee of each beneficiary, in the nature of a death tax or inheritance tax, to cover costs of probate administration.

Obviously the retention of these powers by the General government evidences that it has not yet committed the administration of Quapaw Probate matters to the County Courts and that such matters are not within the jurisdiction of such courts, and hence not within the purview of the State's Inheritance laws.

In this connection, attention is invited to this 5th of powers enumerated above, which is regularly exercised pursuant to the Act of Congress of May 18, 1916, c. 125, Section 1, (Compiled Stats., U. S., Sec. 4227). This is in effect an Inheritance tax, to be deducted from the estate, and it would be an over-assumption to conclude that, having exacted such a charge for services to be performed by Federal officials, Congress ever contemplated a second death charge would be made by another sovereignty, to-wit, the State, wholly lacking in Probate functions in the premises. More particularly does it argue against the proposition that the Indian heir takes only by the grace of the State, upon such terms as it may exact.

It may be inquired when, if ever, does the jurisdiction of the State attach? The answer appears to be that it attaches when the particular matter is no longer in process of administration by the Government officers. This is the rule in Public Land matters and it has been so held in numerous cases. Prominent among these is the case of

Parcher v. *Gillen*, (26 L. D. 34) which was decided January 17, 1898, in a decision prepared by Mr. Justice Van Deventer, who was then Assistant Attorney General for the Interior Department, wherein it was held that the final act of the Secretary marks the point where the jurisdiction of the State begins. And in the case of *Doc. Jim* (32 L. D. 291), the same ruling was made with respect to the jurisdiction of the Secretary in cases involving Indian allotments as was made concerning homesteads on public lands. In the case of the latter, the Department's jurisdiction is exhausted with the issuing of the final patent; in Indian matters it ends with the termination of the trust or restricted period.

These cases were successfully relied upon by the Government in the case of *McCurdy* v. *United States*, 264 U. S. 484, decided by the Supreme Court of the United States April 7, 1924, in favor of the United States.

The latter case involved the taxation of Osage surplus lands which were expressly subjected to taxation by Act of Congress. The taxes involved were those levied for the year 1909, but at the time the assessment was made the allotments, although duly scheduled, had not been consummated by final approval of the tribal deeds to the allottees. It was claimed by the Government that the lands could not be assessed for taxation while the allotments were in process of administration by the Interior Department, and its contention was upheld by the Court.

Section 5 of the Act of the Legislature of Oklahoma of March 25, 1919 (S. L. 1919, p. 429) reads, in part, as follows:

> "Every such tax shall be and remain a lien upon the property transferred until paid."

The Act of Congress of March 2, 1895, (28 Stat. 876, 907) contains the following provision, which was carried into the patents to the Quapaws:

> "*Provided*, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

This restriction was extended by the Act of Congress of March 3, 1921 (41 Stat., 1225, 1248), which reads as follows:

> "(a) Sec. 26. That section 1 of the Act of Congress approved March 2, 1895, (Twenty-eighth Statutes at Large, page 907), in so far as the same relates to the allotments of land to the Quapaw Indians and to restrictions against alienation of said allotments, be, and the same is hereby, amended so as to provide that the restrictions which now exist against the alienation of the lands allotted to and allotted lands inherited by the Quapaw Indians named in the letter of January 15, 1921, of the Secretary of the Interior, to-wit: (naming John Beaver and others, including Benjamin Quapaw), and including any Quapaw allotted or inherited lands in which any of the said named Indians have any undivided interests, be, and the same are hereby, extended for the further and additional period of twenty-five years from the date of this Act: *Provided, however*, That the Secretary of the Interior may, with or without application of the Indian owner, remove such restrictions, wholly or in part, after he has found such Indian owner to be as competent as the average white man to conduct his own business affairs with benefit to himself, under such rules and regulations as he may prescribe in regard thereto, and concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians: *Provided, further*, That all said lands allotted to or inherited by the Quapaw Indians may, when subject to restrictions against alienation, be leased for mining purposes for such period of time and under such rules, regulations,

terms and conditions only as may be prescribed by the Secretary of the Interior, and said lands while restricted against alienation may be leased for mining purposes only as provided herein: *And provided further,* That the production of minerals on said lands may be taxed by the State of Oklahoma in all respects the same as that produced on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid from out of the individual Indian funds held under his supervision, belonging to the Indian owner of the land, the tax so assessed against the royalty interests of the respective Indian owner in such production: *Provided, however,* That such tax shall not become a lien or charge of any kind or character against the land or other property of said Indian owner."

It is improbable that the Legislature of the State of Oklahoma intended, even if it had the power, to apply the said Inheritance act of 1919, or the previous Act of March 15, 1915 (S. L. 1915, p. 215) to any matter wherein enforcement and collection would involve a conflict with the laws of the United States, and yet such would be the inevitable result of such action, if attempted, by reason of the irreconcilable nature of the Federal and State laws.

Referring to the concluding part of Section 26 of the Act quoted above, two things will be noted: (1) Affirmative legislation was required to make these lands subject to the gross-production tax, and (2) That tax, though permitted, is not to become a lien on the land or property of the Quapaws. From which it may be safely reasoned, that, *without the consent* of Congress, there can be no tax, and, of course, no lien in such a case, where the land is inalienable.

The conflict between the laws appears from another viewpoint. If the State can take away any part of the allot-

ment of a Quapaw, whether to enforce a death tax, or for any other reason, it can interfere with the even operation of the Federal restrictive law which runs for a *full term of twenty-five years*, and not for the mere life of the allottee. Under the Federal law, the property is to be held intact, for whom and for such reasons as the government may have in mind, for the full period; but, under the State law, in case of a death, the preservation of the estate thereafter is possible only in a diminished form. On the one hand, the Government says: "We desire to preserve this property in its entirety for the full term, regardless of whether the allottee survives the period or not." On the other hand, the State says: "We think it long enough to hold the property intact if we thus preserve it during the life of the allottee."

If the power be once conceded to thus diminish, burden and impair a restricted estate, where will the destructive process end? Obviously the Legislature would be bound by no limitation save its own will, and could strike down, effectively, all legislation of Congress imposing restrictions that do not end with death.

But counsel for appellant brush all this aside with the sweeping assertion that the Inheritance Tax is a price for a *privilege*, and hence within the power of the State to prescribe because the privilege of inheriting property comes by grace of the State. They forget, however, that there are other privileges as well, which the State also grants, such as the privilege of doing business within the State for price, and that as to such, this Court has ruled *there must be no interference with a Federal instrumentality.* Illustrative of this is the decision of the Court in *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292, 298, wherein,

speaking of the tax on the business of mining the coal lands of the Choctaws and Chickasaws, the Court said:

> "From the foregoing it seems that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. *Such an agency cannot be subjected to an occupation or privilege tax.*" (Italics ours).

In *Brown* v. *Maryland,* 12 Wheat. 419, 444, Chief Justice Marshall, holding that a tax on the occupation of an importer was a tax on imports, said:

> "It is impossible to disguise from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on an article imported only for sale, is a tax on the article itself."

In like manner, there is no practical difference between taxing an Indian estate *directly* and levying a tax on the *privilege* of inheriting, where the tax is collected in each case from the property or is a burden on the beneficiary. Whether it is called, bluntly, a tax, or a license privilege, the instrumentality of the government is impaired precisely as much in one case as in the other.

II.

The State Inheritance Tax Laws are repugnant to and inconsistent with the Constitution of the State of Oklahoma and the Enabling Act of Congress admitting the State into the Union.

It is immaterial in this connection whether the State Inheritance Tax should be classed as a property or privilege tax so long as it contemplates the *taking* of a part of the property transmitted, for it is tantamount to asserting a claim or right to the property, as well as providing for a disposition of it contrary to that contemplated by Congress.

Section 1 of the Enabling Act contains an inhibition against any action that would limit or affect the authority of the Government in Indian matters. Obviously, a State law that would create a lien where Congress had declared land should be inalienable would come within this inhibition, as would also a State law which recognized the full force of a restrictive act only during the life of the allottee regardless of the term prescribed by Congress.

In Section 3 of Article 1 of the Constitution the people disclaim all *right* and title to Indian lands, while subject to Government control and supervision. How, then, can the right be asserted, in the exercise of the State's power to tax, to reach out and take for its own benefit any part of a restricted estate, in the face of this constitutional provision? If so, the State's disclaimer is not sincere or binding.

Similar provisions of law were construed affecting Kansas in the case of "*The Kansas Indians.*" 5 Wall. 737, 755. See also, *Stearns* v. *Minn*, 179 U. S. 249.

Counsel for appellant contend that the State laws of descent and distribution have applied since statehood to the Quapaws, and, with that proposition as a major premise, argued inferentially that a collateral act laying an inheritance tax must also apply, the deduction being that the State gave the inheritance right and hence could name its price for so doing.

In the first place, the State, as has been shown in a previous connection, did not give that right, which was, instead, derived from a treaty grant.

In the second place, it does not follow that a particular law of succession, as applied to Indian inheritances, is in fact a *State*, as distinguished from a *Federal* act. On the contrary, appellees contend that where *State Laws* have been made the rule for the determination of the restricted Indian heirs, such laws are really *Federal Laws*, by adoption.

This is illustrated by the decision of the United States Court in Oklahoma rendered in the year 1910, in the case of *United States* v. *Bellm*, (182 Fed. 161), wherein the Court construed the General Allotment Act of February 8, 1887, as amended by the Act of February 28, 1891, which provided that the laws of the State of Kansas regulating descent and partition of real estate should apply to lands in the Indian Territory allotted in severalty, and held that said proviso adopting the laws of descent of the State was merely for the purpose of providing a rule by which the heirs should be determined and that there was no intention of abrogating the trust in any case.

It is respectfully submitted that it was never intended by any act of Congress to supersede, without qualifications, the Congressional laws pertaining to probate matters by

State laws in lieu thereof. This requires us to go back to the original Act of Congress of May 2, 1890, (26 Stats. 81), putting into effect (adopting) the laws of Arkansas in the Indian Territory. The laws which were so adopted were such as, in the language of Section 31 of that Act, were "*not locally inapplicable or in conflict with any law of Congress.*

Later, by Act of April 28, 1904, (33 Stats. 573), Congress declared that all statutes of Arkansas "*theretofore put in force*" in the Indian Territory should apply generally to all persons and estates therein.

Still later, when the State Constitution became effective, it continued in force in that part of the State which was originally included in the Indian Territory all laws which were in force therein *when the State was admitted to the Union.*

Tracing these acts back, as we would an abstract of title, it would seem that Congress never meant to consent to any legislation in these matters in conflict with its own laws and that it never authorized any departure in that respect from the original terms of said Act of May 2, 1890.

Even if it has so consented, it was free to reassert at any time its Constitutional powers with respect to Indian affairs.

Turning now to the contention of counsel for the appellant, as presented in their brief, to show that the sovereign powers acquired by the State of Oklahoma were not restricted or limited by the provisions in the Enabling Act and in the State Constitution, with respect to Indian matters, it would seem that the law upon this point is too well settled to merit serious con-

troversy. It is sufficient, perhaps, to call attention again to the decision of the State Supreme Court in *Malone* v. *Wamsley, supra,* and especially to the latter portion of the excerpt from the opinion quoted therein which is quoted on page 11 hereof.

It may be remarked, however, in this connection, that in one case specially relied upon by counsel for appellant, to-wit, the case of *Coyle* v. *Okla.,* (221 U. S. 559), the conclusions of the Court, set forth in the 5th paragraph of the syllabus, wholly upholds the authority of Congress to embrace in an Enabling Act conditions relating to Indian affairs.

Aside from all other considerations, appellant, as an officer of the State, should not be heard to repudiate its covenant with the United States, especially as the same has been upheld by the Supreme Court of the State.

Referring to the arguments of the appellant based upon the State citizenship of appellees, it would seem that sufficient answer thereto is found in the decision of the United States Supreme Court in *Tiger* v. *Western Investment Co., supra,* as well as in the decisions of that Court in numerous other cases holding there is no necessary conflict between State citizenship and national guardianship and nothing can take such Indians out from the general rules applicable to the owners of restricted or trust estates. It was also held in *United States* v. *Bowling,* 256 U. S. 484, which arose in the Quapaw Agency.

There is still another aspect of the State legislation deserving of consideration which appellees believe demonstrates the inapplicability of the State Inheritance Tax law to these restricted estates, as will be seen from a careful

reading of certain portions thereof. For example, by examination of Section 14 of the Act of 1919, it will be found that the County Court is primarily the forum for the determination and collection of State Inheritance taxes, and that it is empowered to act in those cases which are *subject to its jurisdiction.* And yet it is obviously powerless as to restricted estates to take over the same, through the appointment of administrators, or to otherwise administer the Act. It is fair to conclude, therefore, that the Act was not intended by the legislators to apply to such estates. It has been held by the Supreme Court of Oklahoma in the case of *In Re Harkness Estate,* (83 Okla. 107, 204 Pac. 911) that to give a court authority to impose an inheritance tax, it must have jurisdiction of the parties or the subject matter. Yet it is lacking as to such jurisdiction in the instant case.

We quote, in this connection, from page 13 of the opinion as follows:

> "Jurisdiction means authority of the matter to be determined. It means power to order, to adjudge, and to enforce judgment. The extent of jurisdiction of State courts is to be determined from two sources, viz., from the power conferred by express or implied provisions of State law, and by express or implied limitations of Federal law. The courts of one state cannot invade the exclusive province of, nor control the domains of, courts of another state without transcending Federal limitations."

Attention is also invited to the provisions of the State Inheritance Tax laws making the tax a lien on the property, for the reason that this very provision should cause the Act to fail, applying the opinion of the State Supreme Court in *Collins Investment Co.* v. *Beard,* 46 Okla. 310, 148 Pac. 846. This because the State law provides for the alien-

ation of Indian lands (if applied to these restricted estates) which the Federal law forbids, thereby rendering the decision in that case clearly applicable.

Counsel for appellant have followed their argument so far that they have been compelled to reject the Constitution of the State, as a compact which it could not enter into. On the contrary, we rely upon that instrument as a sure protection for appellees.

Section 3 of Article 1 of the State Constitution contains the following provision:

> "The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation."

With this provision in mind, appellees respectfully submit to the Court that the State cannot consistently assert the right, or enforce said right, to take, from any restricted Indian estate a portion thereof for the privilege of inheriting such estate. This for the reason that such action is avowedly predicated upon the supposed right or interest of the State in the property, as grantor of such privilege. Obviously it could not assume or undertake to grant any interest or right which it did not claim to possess at the time of making such grant, but, any such claim would be repugnant to its disclaimer as set forth in said Section 3 of Article 1 of the State Constitution which is quoted above.

The faith of the State is also pledged by the provisions of Section 6 of Article X of the Constitution of Oklahoma, as follows, by promising to refrain from taxing—

"All property owned by Morrow Indian Orphan Home, * * * * and such property as may be exempt by reason of treaty stipulation, existing between the Indians and the United States Government, or by Federal laws, during the effect of such treaties or Federal laws."

III.

If any kind or class of property is itself exempt from taxation in pursuance of a governmental policy, as a Federal Instrumentality, it follows, as a corollary, that it cannot consistently be subjected to any indirect form of taxation such as an income, gross production or privilege tax.

If, for example, a given property is set apart for a special purpose, such as the support of a public school or other institution, what benefit would accrue to the beneficiaries if the incomes should be applied to other purposes? Obviously, the income from property is that which makes it valuable and a property which produces no income, or the income from which is lost or diverted, becomes a burden. Accordingly, the principle has been recognized by the Supreme Court that a Federal Agency devoted to the development of restricted Indian lands, cannot be subjected to the State Income tax.

In the case of an exemption of restricted property for a term of years—not necessarily for the life or benefit of any particular person—as in cases where the restrictions run with the land, it is easy to see that the deduction of an Inheritance tax might operate quite as effectively to thwart the plans of the Government as would the loss of the income from such property. In either case, the value of the property set aside for the particular use or purpose would suffor a diminution.

—*Evans* v. *Gore*, 253 U. S. 345;
—*Gillespie* v. *Oklahoma*, 257 U. S. 501;

—*Shaffer* v. *Carter*, 252 U. S.37;

—*Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292;

—*In re Gross Production Tax of Wolverine Oil Co.*, 53 Okla. 24;

—*Indian Territory Illuminating Co.* v. *State of Oklahoma*, 240 U. S. 522;

—*Pollock* v. *Loan & Trust Co.*, 157 U. S. 429;

—*Brown* v. *Maryland*, 12 Wheat. 419;

—*Dobbins* v. *Erie Co. Commissioners*, 16 Pet. 435;

—*Oahu Railway & Land Co.* v. *Pratt*, 14 Hawaiian Repts., 126;

—*Opinion of the Attorney General* of March 15, 1924, in the matter of the taxation of incomes from restricted lands in the Five Civilized Tribes;

—*Opinion of the Attorney General* in the matter of the taxation of incomes from restricted lands in the Quapaw Agency.

IV.

Where Indian lands are unequivocally declared inalienable and are held under governmental control and supervision, the restriction is a limitation upon involuntary, as well as voluntary, alienation and renders such lands exempt from all forms of taxation.

This rule has been announced in substance both in cases where the lands were allotted under trust patents and under restricted fee patents. The form of conveyance is not material so long as the Government retains control and supervision and has any duty to perform. Of course this rule does not apply where there are affirmative words in a statute giving the right to tax a part of the lands of an Indian, as in the case of the surplus of the Osages, or to impose a gross production tax as was done in the case of those Indians.

The law is stated on page 955 of Volume 6 of the Encyclopedia of U. S. Supreme Court Reports, as follows:

> "And treaties exempting Indian lands from levy, sale and forfeiture are to be construed as exempting them from levy and sale for nonpayment of taxes. Lands allotted to individual members of Indian tribes patented to them with express restriction that they are not to be sold without the consent of the government, or lands allotted to Indians and held in trust by the United States for the benefit of the Indians, or improvements on personal property upon Indian allotments held in trust for Indians by the United States, are not subject to taxation by the state within which the allotments are situated.
>
> —*The Kansas Indians*, 5 Wall. 761;
>
> —*Stearns* v. *Minn*, 179 U. S. 249;
>
> —*United States* v. *Rickert*, 188 U. S. 432."

In the case of *The Kansas Indians, supra*, the lands had been conveyed to the Indians subject to the restriction that said lands should not be sold by the grantee or his heirs without the consent of the Secretary of the Interior. Construing this language in connection with the Act admitting Kansas to the Union, which Act employed substantially the same words as that admitting Oklahoma to statehood, the Supreme Court of the United States held invalid a law of Kansas which attempted to subject such lands to taxation.

Here it may be noted that the language attaching restrictions to the lands of the Kansas Indians was the same, in effect, as that employed with respect to Quapaw lands for the same purpose.

In the case of *Morrow et al.* v. *United States*, 243 Fed. 854, the doctrine of non-taxability was carried to a further degree. There an attempt had been made to levy taxes

upon lands from which restrictions had been removed, such removal being prior to the date of issuance of final or fee patents. The Act under which the lands were allotted was the General Allotment Act of February 8, 1887, (24 Stat. 388), which contained no exemption from taxation but did provide against alienation and incumbrance.

The question was brought directly home in the case entitled, *In re Skelton Lead & Zinc Co.'s Gross Production Tax*, which affected Quapaw restricted lands. The Supreme Court of Oklahoma held in that case (speaking of the 1919 tax) that the returns from such lands were exempt, by reason of Federal restrictions, under Art. X, Sec. 6 of the State Constitution, 81 Okla. 134, 197 Pac. 495.

V.

Exemptions in express words are not necessary to render Indian lands non-taxable if it is clearly intended the lands are to be inalienable.

On this point we quote from Note No. 25, page 955, Volume 6, Encyclopedia of United States Supreme Court Reports:

> "Lands of Shawnee Indians held in severalty were not subject to State taxation, although in the last treaty with the Shawnees, the one authorizing the allotments there was no express stipulation for exemption from taxation. The *Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667."

A similar question as to exemption arose in Maryland with respect to the attempt of that State to tax National Banks, resulting in the case of *Osborne* v. *United States Bank*, 9 Wheaton 740, which was an injunction proceeding to restrain the collection of of the tax. In that case Chief Justice Marshall decided two questions which are

involved in this case we are now presenting, to-wit, whether exemptions must necessarily be in express words. and, 2nd, whether a suit in equity was the proper course to pursue for relief. The first was decided in the negative; the second, in the affirmative.

With respect to the matter of exemption, the power of a State to tax National Banks, the Chief Justice said: (Page 866)

> "It is contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not be to implead by the court. • • •
>
> It is not unusual for a legislative act to involve consequences which are not expressed. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance."

The intention of Congress as to the payment of State taxes is further disclosed by the general act of March 1, 1907, (34 Stat. 1016), which provides for the payment of taxes by the Commissioner of Indian Affairs, from trust funds, "in any case where restrictions have been removed".

VI.

The decisions cited by counsel for Appellant for the purpose of showing that State inheritance taxes have been upheld, notwithstanding the government has some form of interest in the inherited property, have no controlling force in determining the validity of an inheritance tax on restricted Indian lands.

It is contended by counsel for appellant that there is an analogy between estates in which the Government had, or has, a proprietary or other interest, by reason of

its past or present relation thereto, and restricted Indian estates held in trust by the Government, and that, if a state inheritance tax in valid as to the one it must be valid as to the other.

In support of these contentions they reply mainly upon two decisions of the Supreme Court of the United States. One of these decisions was rendered in the case of *Plummer* v. *Coler*, (178 U. S. 115), wherein the Court held that an estate was subject to the inheritance tax of the State of New York, notwithstanding the said estate included Government bonds which contained a clause rendering the same non-taxable. Two contentions were presented: (1) that the inheritance charge was a tax on property and hence illegal as to the bonds, and, (2) that the tax impaired the borrowing power of the Government. The Court held that the tax was a transfer charge and not a property tax, and that as a matter of fact, it did not appreciably injure the Government's borrowing power.

It will be observed first, that in this case the title had passed out of the Government before the inheritance tax was claimed. It therefore, did not affect property of the United States as a tax. The second question was one of policy and that, the Court held, was not material.

Clearly, there is no logical comparison between such a case and the imposition of an inheritance tax upon restricted Indian property which has not passed out of government possession or control, and which is being held, and must be held unimpaired, for the purposes of the trust, any dimunition of which may defeat the purpose for which the trust was created.

The other case was that of *United States* v. *Perkins*, (163 U. S. 625), which also arose in New York, and which involved the legality of a State Inheritance Tax on a bequest to the United States.

But little comment need be made as to this case as the estates was not the property of the United States at or before the time the inheritance charge attached, and the United States had no interest, direct or indirect, therein, before the will was executed. The United States never had any interest in the estate except in the net proceeds. Clearly, this case is no more analagous than the former to cases of the kind which are before the Court in this proceeding.

VII.

The decisions cited by Counsel for Appellant to show that the United States has no jurisdiction of Indian lands located in new States, after the admission of such States, have no controlling force in the determination of the question before the Court. This, for the reason that there is nothing in those decisions in derogation of the power of Congress to act in matters committed to its jurisdiction by the National Constitution even though the subject matter may be located within the limits of a State.

The case of *Coyle* v. *Oklahoma*, (Coyle v. Smith), 221 U. S. 568, 55 L. Ed. 853, is quoted at length in Appellant's brief to show that the State has or should have sole jurisdiction in Quapaw probate matters notwithstanding the Enabling Act. That case simply turned upon the authority of the State, after its admission into the Union, to change the location of its capital contrary to a provision in said Act requiring that no change be made prior to 1913. This requirement was one which Congress was not constitutionally authorized to make and hence not

binding on the State. But this ruling has no application to an Indian question where Congress has plenary power under the Constitution. In fact, the 5th paragraph of the syllabue in this very case upholds us in this view. The Coyle case is not, therefore, an authority for appellant's contention, notwithstanding it is referred to in his brief in the court below as "the most applicable case."

Counsel for Appellant quote at length in their brief, from the decision of the Supreme Court of the United States in the South Carolina liquor case, *South Carolina* v. *United States*, 199 U. S. 437, wherein it was held that internal revenue taxes were due the government in connection with the liquor business in that State, owned and supervised by the State. This decision was bottomed on the Supreme Law clause of the United States Constitution and the constitutional authority of Congress to lay and collect duties, imposts and excises. If it has any place in the argument, it justifies Congress in enacting the legislation in question, for the control and disposition of Indian estates, in the exercise of its constitutoinal powers respecting Indian affairs.

It is argued by counsel for the Appellant, and perhaps correctly, that the question of the propriety of taxing property owned by a sovereign turns upon whether such property is held for a governmental purpose or merely as an incident of conducting a business, as such. In the South Carolina liquor case it was considered that the property was held and operated as a business. But it is plain that this is no precedent for taxation by the State in an Indian case, where a national policy is involved, fixed by constitutional provision and effectuated

by laws and treaties, pursuant to which trust estates are held and supervised. As the Circuit Court of Appeals said, in *United States* v. *Thurston County, Nebraska, et al.*, 74 C. C. A. 430:

> "The *lands* and their *proceeds* so long as they are *held* and *controlled* by the United States and the term of the trust has not expired, *are alike instrumentalities* employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians for whose benefit the complainant holds them, and *they are not subject to taxation by any State or County.*" (Italics supplied.)

In Appellant's brief reference is made to that part of the estate consisting of money on hand at the death of the decedent, and the conclusion is drawn that such part of the estate is clearly subject to the inheritance tax. This inference, we believe, is entirely unwarranted for the reason that said money accrued to the credit of the deceased in the form of royalties from restricted Indian lands, and was paid to, and supervised by, the Interior Department, pursuant to its regulations. The royalties had the same restricted status and were subject to the same supervision as he lands from which they were derived.

—*Parker* v. *Riley*, 250 U. S. 66;
—*Parker* v. *Richard*, 250 U. S. 235.

The rulings in these three cases, considered together, should dispel any doubt that might arise as to whether restricted lands and *the proceeds derived therefrom* stand upon different planes while held in trust by the United States. Be that as it may the stipulation in this case, and the allegations of the Amended Bill, confine the issues here, as below, to the taxable status of the inherited allotments.

It was contended in defendant's (now appellant) brief, in the court below, that full and complete probate jurisdiction was conferred upon the Federal territorial courts and that such jurisdiction was passed on to the State Courts, and from these premises the deduction was drawn that:

> "The transfer of this extensive power over probate matters, to the State Courts, must, of necessity, operate as an abrogation of any potential authority of the Federal Government in relation to decedent's estates."

That the premises are unsound on which this conconclusion is based will be seen by reference to the decision of the Supreme Court of Oklahoma in *Coleman* v. *Battiest*, 65 Okla. 71, 162 Pac. 786, holding that the district courts of the State had no jurisdiction—and they were the successors of the territorial courts—to order and decree the partition of the inherited lands of full-bloods. And, it should be borne in mind, in this connection, that Congress deemed it necessary, in order to remedy the situation, to enact the Act of June 14, 1918, (40 Stat. 606), entitled:

> "An Act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes."

Construing the Act in *State ex rel. Miller* v. *Huser*, 76 Okla. 130, 184 Pac. 113, the Supreme Court of Oklahoma held that said Act is not unconstitutional and void, nor in contravention of United States Constitution,

Article 3, Section 2, but is a proper exercise of the political and administrative power and duty of Congress to legislate for restricted Indians of the Five Civilized Tribes concerning their property during the continuance of the national guardianship over such restricted Indians.

It is therefore evident from this decision, as well as the Act which it construes, that the courts of Oklahoma had not been vested with full probate powers *by previous legislation*, and had not superseded the Secretary of the Interior in the supervision of Indian matters. Hence, the claim of appellant, that said courts acquired full jurisdiction over these Quapaw estates must fail. It follows that such courts could not, in view of the lack of such jurisdiction, enforce the State inheritance tax. *In re*: *Harkness Estate*, 83 Okla. 107, 204 Pac. 911.

On the other hand, under the reserved and constitutional powers of the National Government, it is obvious that the Secretary of the Interior is legally vested with quasi-judicial powers, in probate matters, concerning the Quapaws, for which statement the decisions of the Supreme Court of the United States, in the Bowling and Blansett cases, *supra.*, are ample authority.

Counsel for Appellant contend that, notwithstanding the provisions of the Enabling Act, the State has inherent rights in probate matters which exclude the possibility of any Federal jurisdiction concerning the same. This is a tacit admission of our contention as to the construction and effect of said Act and of the agreement of the State, as embodied in its Constitution, which, we contend, preclude the exercise of any authority, or the assertion of any right (by taxation, or otherwise) by the State over these Indian estates while the National supervision con-

tinues. The argument of the appellant, therefore, resolves itself into a challenge as to the constitutionality of the Enabling Act.

According to the decision of Hon. R. L. Williams, in the case of *United States* v. *Board of Commissioners of McIntosh County; Same* v. *Stuckey, County Treasurer; Same* v. *Ranson, County Treasurer*, 271 Fed. 747, similar provisions to those in the Oklahoma Enabling Act, relating to the powers of the National Government, were incorporated in the Enabling Acts applicable to every State admitted to the Union except five. Judge Williams evidently did not question the validity of these Acts; neither did the Supreme Court of this State question them in the case of *Malone* v. *Walmsley*, or in the case of *Collins Inv. Co.. et al.* v. *Beard*, both of which are cited and quoted on page 11 of this brief. Nor was there any exception taken to similar provisions in the Enabling Act construed by the United States Court in the case of *The Kansas Indians*, 5 Wall. 761.

Properly read and understood there is nothing in the cases cited by counsel for the appellant to show that Congress may not legislate as to Indian affairs, after the admission of a State, the same as before, where it has not relinquished its powers. This, because it is vested with such powers by the Constitution of the United Sstates with respect to Indian matters, just as it is vested with authority respecting Interstate Commerce and other matters.

VIII.

The constitutional theory advanced by Counsel for Appellant is another form of the old contention, now obsolete, that the grant of citizenship to Indians was inconsistent with restrictive Indian legislation, and it is so far-reaching and all-inclusive that one of two conclusions must follow: (1) it must be accepted as properly challenging the validity and correctness of the actions and discisions of all Departments of the National Government respecting important Indian matters in Oklahoma, beginning with the Enabling Act, or, (2) it must be rejected as fundamentally unsound.

The contention of counsel for Appellant, based upon his constitutional theory, seems to us to be analagous to the old, and now discarded, theory that Indians upon acquiring citizenship, immediately ceased to be wards of the government.

It is the same argument in another form, that when a community of persons, taken collectively, becomes a State and is vested with the political status of a State, the constitutional powers of the general government terminate with respect to Indian matters.

Counsel for Appellant have pursued this argument so far that they have found it necessary to challenge the constitutionality of several important Acts of Congress, to question the efficacy of the Oklahoma State Constitution and to join issue with the conclusions of this Court and other Federal Courts and of the Supreme Court of Oklahoma.

The contentions of opposing counsel must stand, if at all, upon two premises, to-wit: (1) The Oklahoma Enabling Act is unconstitutional with respect to the powers reserved by Congress over Indian matters; and (2) Indian lands and moneys held in trust and under governmental supervision are not Federal instrumen-

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talities employed by the United States for the benefit of the Indians.

These contentions are in direct conflict with the decision of this Court and of the Supreme Court of Oklahoma, in the cases cited herein, notably in *Sperry Oil & Gas Company* v. *Chisholm,* 264 U. S. 488; *Malone* v. *Walmsley,* 80 Okla. 181, and *United States* v. *Rickert,* 188 U. S. 432, and *United States* v. *Thurston Co.,* 74 C. C. A. 430.

We desire to point out in this connection the scope of Appellant's contentions and the extreme grounds which he attempts to sustain, it being apparent that the argument of opposing counsel leads, directly and inferentially, to the following conclusions:

That the Department of the Interior has no jurisdiction to determine the heirs of restricted Quapaws, to approve their wills, and to handle their estates, with the result that Congress in appropriating money for sixteen years for such purposes in the Quapaw and other tribes, has strained its constitutional powers.

That the Department of the Interior, in maintaining its Heirship Division in the Indian Office for the adjudication of heirship cases and the approval of wills, is responsible for an unwarranted and unlawful use of public funds.

That the laws of Congress, beginning with the Act of June 25, 1910, (36 Stat. 855) relating to the determination of Indian heirs and kindred matters, and numerous acts supplemental thereto, are contrary to, or unwarranted by the Constitution of the United States.

That the Enabling Act of Oklahoma is not constitutional and is not binding upon the State (notwithstanding

the people agreed to it in their constitution) to the extent that it permits the National Government to legislate with respect to Indian matters as fully and completely as it might do during the territorial period.

That the Supreme Courts of the United States and the State of Oklahoma have erred in numerous cases in their construction of the law pertaining to these matters, with the result that decisions, such as the following, must be modified or reversed, to-wit:

—*Collins Inv. Co. et al.* v. *Beard*, 46 Okla. 310, 148 Pac. 846;

—*Malone* v. *Walmsley*, 80 Okla. 181, 195 Pac. 485;

—*Battiest* v. *Coleman*, 65 Okla. 71, 162 Pac. 786;

—*State ex rel. Miller* v. *Huser*, 76 Okla. 130, 184 Pac. 113;

—*The Kansas Indians*, 5 Wall. 761 (and related cases).

—*Hallowell* v. *Commons*, 239 U. S. 506;

—*Blansett* v. *Cardin*, 256 U. S. 319;

—*United States* v. *Bowling*, 256 U. S. 484;

—*Sperry Oil Co., et al.* v. *Chisholm, et al.*, 264 U. S. 488.

When a party rests his case on the unconstitutionality of a statute he takes upon himself the burden of clearly proving the repugnance between the law and the Constitution. In *Fletcher* v. *Peck*, 6 Cranch. 87, Chief Justice Marshall said:

> "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability with each other."

But the conclusions of Appellant are so far-reaching and all-inclusive that the mind balks at the idea of accepting them. Upon authority, as well as reason, they must be rejected. To quote in substance, the language used by Mr. Justice Brewer in another case, "the reach to which the argument goes demonstrates that it is unsound."

We summarize our position as follows:

1. That restricted Indian lands and the proceeds therefrom, are subject to the sole jurisdiction of the Secretary of the Interior.

2. That the Secretary of the Interior has exercised, and is exercising, probate functions concerning such property, properly and lawfully.

3. That the land, and the proceeds therefrom, are alike Federal instrumentalities for the benefit of the Indians, while the property is held, or controlled, by the Interior Department.

4. That the State Inheritance Tax law is repugnant to the Supreme law clause of the Constitution of the United States, in that it undertakes to fasten a lien upon Indian esates which, by Act of Congress, are inalienable.

5. That the administration of the State Inheritance tax law would require acts contrary to due process of law, in that the compulsory sale of the land to collect the tax must necessarily be made through the County Court, under the State laws, and not with the approval of the Secretary of the Interior, as required by Federal law; and for the further reason that the estates would have to be taken over and administered by State officers.

6. That the State laws governing the descent and

distribution of these estates are, as to the Quapaws, mere rules of succession which have been adopted by Congress for the guidance of Federal Officers.

7. That the Quapaw estates are already subject to a death tax under the Federal law.

8. That the right of the descendents of the Quapaws to hold and possess the estates of their fore-fathers flows from the laws and treaties of the United States and does not come by grace of the State.

9. That the National Government is powerless to create and execute an Indian trust, to run with the land, unimpaired and undepleted, if the right of succession can be denied or in any degree impaired by the State through its inheritance tax laws, the test being not alone the extent to which the law goes at present but rather the extent to which the power might be asserted.

10. That the imposition of the State Inheritance tax, in the case of the transfer of Quapaw estates, would be a burden upon a Federal instrumentality, and that the practical effect would be the same regardless of whether such tax is a property tax or a transfer charge.

11. That the laws of the United States, including the Oklahoma Enabling Act, and the decisions of the State and Federal Courts, pursuant to which these principles and powers are asserted and exercised, are entirely consistent with the Constitution of the United States.

Respectfully submitted,

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For the Appellees.

Dated February 24, 1926.